Return-to-Work: Benefits Guidance in the Time of COVID-19

A Lexis Practice Advisor® Article by
Michelle Capezza and Gretchen Harders, Epstein Becker Green, P.C.

Michelle Capezza
Epstein Becker Green, P.C.

Gretchen Harders,
Epstein Becker Green, P.C.

This article discusses employee benefit and compensation plan issues that many U.S. businesses will face when preparing for their employees' phased returns to the workplace during the coronavirus pandemic and the impact that various return-to-work approaches may have on their employee benefits and compensation programs. The article also addresses how some innovative employee benefits and compensation programs may enhance workplace morale and productivity by assisting employees transitioning back to the workplace.

Qualified Retirement, Health and Welfare, and Fringe Benefit Plans

Plan Service Crediting, Eligibility and Vesting

Many employers that faced business interruptions because of the pandemic were required to reduce employees' hours – in some instances to zero for employees placed on furlough. Reduction of hours may have affected employees' benefit plan eligibility (such as for retirement and health and welfare plans) and vesting (such as for retirement plans). Employers, as plan sponsors, must pay careful attention to service crediting calculations, under applicable plan terms, which might not be straight forward in this situation. For benefits that are being reinstated, any applicable waiting periods (including potential waiver of waiting periods) must be administered. In some instances, employers may wish to consider plan amendments to address service crediting issues, especially where employees will be returning in phases or on a reduced hours basis through job sharing arrangements. Any amendments modifying eligibility and vesting service provisions, however, must be made in a nondiscriminatory manner and must comply with anti-cutback rules (as applicable).

Compensation Adjustments and Retirement Plan Contributions

Employers that have implemented compensation reductions (and that are considering future adjustments) will need to account for these changes in retirement plan contributions in accordance with applicable plan terms. Proper application of plan compensation definitions is often an area of benefit plan noncompliance and any repeated mid-year adjustments will add complication. For returning employees whose contributions had ceased, employers must be careful to resume the employees' plan contributions on a timely basis and to be attentive to the resumption of any plan loan repayments (if the employees are not eligible for a suspension on repayments for the plan year). Further, employers, as plan sponsors, should monitor the administration of any changes in employer contributions, including any matching or non-elective contributions to ensure they have been adjusted properly, if applicable. In addition, plan administrators must be mindful to properly apply the relevant definition of compensation, for determining the amount of such contributions.

Reimbursement Accounts (Flexible Spending Arrangements)

Employers that offer reimbursement account programs to employees, such as for dependent care expenses or commuting expenses, may find that their employees have made numerous adjustments to their contributions from salary to these accounts during periods of telecommuting or temporary leave of absence. These adjustments may change again after employees' return to work. Employers should monitor these adjustments to ensure that payroll remittances for these (and any future) changes have been properly implemented.

COBRA and Leave Policies

Leaves of absence may not result in a termination of employment and thus a loss of health coverage that would trigger a COBRA qualifying event. Depending on the arrangement, a reduction in hours may not result in a loss of coverage under a group health plan or otherwise result in a COBRA qualifying event, such as during an FMLA leave, paid leave of absence, or as the employer may provide under the group health plan. Employers will need to navigate and administer coordination of health plan premium payments with the various types of leaves of absence that may have been taken by employees, or taken again during the plan year, as well as those which may have given rise to COBRA qualifying events. The employer's approach must be consistent with the written plan documents, any insurance carrier requirements, and COBRA administration procedures.

Executive Compensation, Employment Agreements, and Severance Programs

Modifications to Performance Targets and Incentive Programs

For some employers, return-to-work planning may include revising their financial projections for the remainder of the year. Such modifications will often impact performance targets for incentive programs. Employers may therefore wish to revisit their fiscal year program targets, and as permitted under the applicable plan documents or agreements, prepare program amendments, and revised award agreements. Any such changes must also include preparation of participant communications to advise affected employees of the revised targets that must be achieved to receive an award, as well as any desired deferral or pro ration of such awards.

Employment Agreements

Employers that have made significant changes to their business strategies may find that key employee roles may have changed significantly during the pandemic. For key employees who have employment agreements, their agreements may no longer reflect the actual work being performed or that will be performed upon the employees' return to work. Employers therefore should review their executive employment agreements to ensure that provisions on duties, compensation and severance triggers, including "good reason" resignation clauses, are appropriately amended or waived to reflect any changes to the role or in the compensation of those key employees. It may also be necessary to review and revise contractual commitments as to benefits, compensation arrangements, bonuses and perquisites (such as travel, housing, health coverage, technology, auto reimbursement and similar items).

Severance Programs

As they analyze return to work options, employers may wish to revise their severance programs to address the level or scope of their severance plans and programs. Some employers may decide to re-hire employees who had been involuntarily terminated and paid severance. In such cases, employers should review whether there are any repayment requirements or whether amendments should be considered to address or waive prior payments. Coordination with leave programs and federal and state WARN obligations also should be considered.

New Benefits Programs

Employers may wish to consider new and innovative employee benefits and expanded services, to assist employees with the various career and personal challenges brought on by the pandemic. Such programs may include, for example:

- Employee assistance programs to provide anxiety and stress counseling
- Telehealth services
- On-site medical arrangements
- On-site day care or expanded child care options
- On-site meal services
- Provision of personal protective equipment in the workplace (even if not required)

- Tuition reimbursement and upskill training
- Financial wellness programs –and–
- Re-design of retirement plan programs to better secure retirement savings

There may also be certain temporary benefits programs that remain relevant with a phased return-to-work approach (e.g., qualified disaster relief payments, childcare/eldercare stipends, commuting assistance benefits, home office expenses, charitable emergency funds).

In planning returns to work, employers may find that they also need to consider reductions in force or other involuntary terminations. In such cases, employers may need to address benefits issues such as providing severance and outplacement benefits, voluntary retirement programs, and other workforce reduction strategies, as well as rights to certain benefits and compensation upon termination. Analyses of potential partial terminations of qualified retirement plans should also be undertaken in the event of significant workforce reductions.

Employers should consider the foregoing as they plan their return-to-work strategies and take proactive steps now to specifically review the potential impact to each of their employee benefits and compensation programs so that they can be timely addressed.

Related Content

Lexis Practice Advisor

- Coronavirus (COVID-19) Resource Kit
- Employee Furlough Considerations in the Time of COVID-19
- Retirement Plan Provisions of CARES Act
- Compensation Definition Rules for Qualified Retirement Plans
- COVID-19 Response: Key Health Plan Sponsor Action Items
- COBRA Compliance and Enforcement
- Cafeteria Plan Design and Compliance (IRC § 125)
- Fringe Benefit Rules (IRC § 132)
- Leave of Absence Effects on Employee Benefit Plans
- Addressing the Coronavirus Impact on Executive Compensation
- COVID-19 Executive Compensation Q&As: Focus on Incentive Plans and Nonqualified Deferred Compensation
- Executive Employment Agreement Resource Kit
- Section 409A and Severance Arrangements
- Severance Benefits Resource Kit